Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-377

RICHARD I. LUDWIG, Appellant

vs.

MASSACHUSETTS, Appellee

ON APPEAL FROM THE SUPREME JUDICIAL
COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	4
Statutes Involved	5
Statement of the Case	5
The Questions are Substantial	7
Conclusion	13

Appendix

A. Opinion and judgment of the Supreme Judicial Court.	1a
B. Statutes Involved	4a
C. Appellant's motion for a jury trial in the District Court of Northern Norfolk	13a
D. Appellant's motion to dismiss in the Six-Man Jury Division of the District Court of Northern Norfolk	14a
E. Appellant's Notice of Appeal.	15a

TABLE OF CASES

	Page
Baldwin v. New York, 399 U.S. 66 (1970)	10
Barker v. Wingo, 407 U.S. 514 (1972)	12
Callan v. Wilson, 127 U.S. 540 (1888)	4, 9, 10
Colten v. Kentucky, 407 U.S. 104 (1972)	11
Commonwealth v. Crapo, 212 Mass. 209 (1912)	8
Costarelli v. Massachusetts, US. , 95 S.Ct. 1534, 44L.Ed. 2d 76 (1975)	6
Duncan v. Louisiana, 391 U.S, 145 (1968)	10, 11
Holliday v. State, 109 R.I. 93 (1971)	10, 12
Jones v. Robbins, 8 Gray 329 (1857)	4, 9
Lemieux v. Robbins, 414 F2d 353 (1st cir.1969) cert. denied, 397 U.S. 1017 (1970)	11
Manns v. Commonwealth, 213 VA 233 (1972)	11
Manns v. Koontz, 451 F.2d 1345 (4th cir. 1971)	11

TABLE OF CASES (cont'd.)

	Page
Railway Express Agency v. Virginia, 282 U.S. 440	2
United States v. Green, 355 U.S. 184 (1957)	13
United States v. Jorn, 400 U.S. 470 (1971)	13
United States v. Marion, 404 U.S. 307 (1970)	12
Walker v. Dillard, 363 F. Supp. 921 (W.D.V. 1973)	11
Ward v. Village of Monroeville, 490 U.S. 57 (1972)	13
Whitmarsh v. Commonwealth, ___ Mass. ___, 316 N.E.2d 610 (1974)	6, 7,11
Williams v. Florida, 399 U.S. 78 (1970)	11

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vs.

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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Appellant appeals from the decision of the Supreme Judicial Court of Massachusetts, entered on June 12, 1975, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported in the Massachusetts Advance Sheets p.1194 (1975) and at 330 N.E. 2d 467. A copy of the opinion is set out in the appendix to this jurisdictional statement at p.1a.

JURISDICTION

The judgment upon which this appeal is taken was rendered on June 12, 1975, by the Supreme Judicial Court and notice of appeal was filed in the Supreme Judicial Court on September 3, 1975. The jurisdiction of the Supreme Court to review the decision of the Supreme Judicial Court on direct appeal is conferred by 28 U.S.C. Sec. 1257(2).

Section 1257(2) is specifically invoked by appellant as the constitutionality of Massachusetts' statutory two-tier trial de novo criminal procedure was held not to be repugnant to the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States.

The statutory procedure is comprised of Article XII of the Massachusetts' Declaration of Rights [1] which provides

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[1] For purposes of Sec.1257(2) a provision of a state constitution is equivalent to a state "statute", Railway Express Agency v. Virginia, 282 U.S. 440.

that no person "shall be... deprived of his ... liberty ... but by the judgment of his peers"; G.L. Ch. 218 Sec. 26 conferring jurisdiction on the courts in the first tier of the system; G.L. Ch. 278 Secs. 18, 18A, providing a right of appeal to the various courts in the second tier, and a right to trial by a jury of six or twelve.[2] This procedure has been construed by the Supreme Judicial Court to mean that an accused is to be tried initially in a district court which comprises a judge and that he shall have a right to a trial by jury by claiming an "appeal" to the

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[2] From a conviction in certain district courts in the first tier, a defendant may "appeal" pursuant to G.L.Ch. 278 Sec. 18, Ch. 218 Sec. 27A, to the six-man jury division of the district courts or to the superior court where he may obtain a trial by jury of twelve pursuant to G.L.Ch. 278 Sec. 2. From a conviction of the Municipal Court of Boston or of a district court of Boston, an accused may "appeal" pursuant to G.L.Ch.278 Sec.18A to the twelve-man jury division of the Municipal Court of Boston, or to the superior court where he is also guaranteed a twelve-man jury pursuant to G.L.Ch.278 Sec.2.

second tier of the Massachusetts system. See Jones v. Robbins, 8 Gray 329, 341-342 (1858).[3]

QUESTIONS PRESENTED

1. Is Massachusetts bound by the rule of Callan v. Wilson, 127 U.S. 540 (1888) guaranteeing a defendant a trial by jury in the first instance when charged with an offense carrying a possible maximum jail sentence in excess of six months?

2. Where a defendant is entitled to a trial by jury, does the interposition of a trial by magistrate impose an unconstitutional burden on the Sixth Amendment right to a speedy trial?

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[3] In particular, G.L. Ch. 218 Sec. 26 confers "original jurisdiction" to the district courts over certain crimes. The term "district court" means a court in which only a judge presides. Compare this statute with its partial ancestor St. 1858 Ch. 448 Sec. 1 which conferred jurisdiction to "police courts" over larceny not exceeding $50. "Police court", as was noted by Chief Justice Shaw in Jones v. Robbins, supra, at p.336, simply meant a "court [that] sits without a jury". (St. 1858 Ch. 448 Sec. 1 is set in full in Jones at pp. 336, 354.)

3. Where the Sixth Amendment guarantees a trial by jury, do state two-tier de novo procedures which deny this right in the first instance violate the double jeopardy provisions of the Fifth Amendment?

STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution; Massachusetts General Laws Ch. 218 Secs. 26, 27A, Ch. 278 Secs. 2, 18, 18A, and 24, comprise the framework of Massachusetts' two-tier trial de novo criminal procedure and are set forth in the appendix at p 4a.

STATEMENT OF THE CASE

Richard I Ludwig was charged in the District Court of Northern Norfolk with driving an automobile negligently so that the lives and safety of the public were endangered, a criminal offense set out in G.L.Ch. 90 Sec. 24(2)(a) carrying a possible maximum two-year jail sentence. At the commencement of his trial, Richard I. Ludwig duly moved the district court judge for a speedy jury trial, specifically asserting his rights under the Fifth and Sixth Amendments. The judge denied this motion, and after a trial, found Richard I. Ludwig guilty of the offense charged.

Thereupon, Richard I. Ludwig claimed an "appeal" for a trial de novo in District Court of Northern Norfolk Six-Man Jury pursuant to G.L. Ch. 278 Sec. 18 and Ch. 218 Sec. 27A.

In the de novo proceedings, appellant duly filed a "motion to dismiss" on the grounds that he was denied a jury trial in the first instance. This motion was denied and appellant took an exception pursuant to G.L. Ch. 278 Sec. 30. After being found guilty and sentenced to pay a $20 fine, payment of which was stayed, appellant filed a bill of exceptions to the Supreme Judicial Court pursuant to G.L. Ch. 278 Sec. 30 alleging that the denial of his "motion to dismiss" was error. The Supreme Judicial Court overruled appellant's exception.

The federal questions underlying this appeal were raised in the first instance by appellant at his trial in the District Court of Northern Norfolk by his motion for a speedy jury trial, and in the District Court of Northern Norfolk Six-Man Jury by his "motion to dismiss" as defined in Whitmarsh v. Commonwealth, Mass. Adv. Sh. (1974), 1403, 316 N.E. 2d, 610, 613 (1974). See also Costarelli v. Massachusetts, ___ U.S. ___, 95S. Ct. 1534. Copies of both motions are set out in the appendix at pp. 13a, 14a.

The federal issues were raised in the Supreme Judicial Court upon appellant's bill of exceptions. In its decision the Supreme Judicial Court held that "the

claimed infractions of constitutional rights – the right to a speedy trial under the Sixth Amendment, the right to a jury trial under the Sixth Amendment and Article 12 of the Massachusetts Declaration of Rights, and the guaranty against double jeopardy under the Fifth Amendment" were properly before the court. The court then passed on the claims and held them "untenable", — "We have suffered no change of mind on the constitutional issues since the Whitmarsh decision."[4]

THE QUESTIONS ARE SUBSTANTIAL

1. The first tier of the Massachusetts' two-tier de novo criminal procedure is comprised of the district courts and the Municipal Court of Boston. These courts have jurisdiction over all crimes carrying a possible prison sentence of five years or less, and certain enumerated felonies having possible maximum prison sentences in excess of five years.[5] Criminal proceedings in these courts are commenced by the issuance of a complaint. If the defendant pleads guilty at arraignment, he is sentenced by the presiding judge. If he is dissatisfied by the sentence, he may "appeal"[6] the issue of

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[4] The decision of the Supreme Judicial Court in effect incorporated the decision in Whitmarsh.

[5] G. L. Ch. 218 Sec. 26.

[6] G.L. Ch. 278 Secs. 18 and 18A.

his sentence to a court in the second tier in the de novo procedure, but he is not entitled to a de novo trial in the second tier on the issue of his innocence or guilt, Commonwealth v. Crapo, 212 Mass. 209, 210 (1912).

If the defendant pleas not guilty in the district court or Municipal Court of Boston, he must stand trial before a judge. He cannot obtain a trial by jury as the lower court "sit without jury". If he is convicted in certain district courts, he has a right of "appeal" to the superior court where he may obtain a de novo trial by jury[7] or to the Six-Man Jury division of the district court.[8] If he is convicted in a district court of Boston or the Municipal Court of Boston, he may "appeal"[9] to the superior court for a de novo trial by a jury of twelve, or alternatively to the twelve-man jury division of the Municipal Court of Boston.[10]

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[7] G.L. Ch. 278 Secs. 2, 18.

[8] G.L. Ch. 278 Sec. 18 and Ch. 218 Sec.27A.

[9] G.L. Ch. 278 Secs. 2, 18A.

[10] Hence, the second tier of the Massachusetts system is comprised of the superior court, the six-man jury division of the district courts, and the twelve-man jury division of the Municipal Court of Boston.

If a defendant fails to "prosecute his appeal [in the second tier], he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court," G.L. Ch. 278 Sec. 24. (emphasis added)

In reviewing this two-tier de novo procedure in Jones v. Robbins, 8 Gray 329, 341 (1858), the Supreme Judicial Court held that it did not violate Article XII of the Declaration of Rights of the Massachusetts Constitution guaranteeing that no law "shall subject any person to ... infamous punishment ... without trial by jury", which words Chief Justice Shaw stated were "equivalent" to the clause -- "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" -- in the Sixth Amendment. However, thirty years later in Callan v. Wilson, supra, at 553-4, Justice Harlan took note of Jones v. Robbins and rejected its reasoning at page 556-7 by holding that the Sixth Amendment guarantee to a trial by jury meant trial by jury in the first instance: "Except in that class or grade of offenses called petty offenses, ... the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of, the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court he is put on trial

for the offense charged." This decision, of course, only affected the two-tier de novo procedure in the District of Columbia and was not binding on Massachusetts prior to the decision by this Court in Duncan v. Louisiana, 391 U.S. 145 (1968).

In Duncan at p. 149, this Court held "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee", and hence inferentially bound the states to the rule of Callan v. Wilson, supra. In particular see Duncan at p. 148 ftn. 30, 181, 182, ftn. 21, 213. Following Duncan, this Court held in Baldwin v. New York, 399 U.S. 66 (1970), that the states were bound to afford an accused a trial by jury with respect to all crimes carrying a maximum prison sentence in excess of six months.

Subsequent to Duncan and Baldwin, state and lower federal courts have rendered conflicting opinions as to whether the conjunctive effect of Duncan and Baldwin bound the states to the rule of Callan v. Wilson. A unanimous Supreme Court of Rhode Island answered the question in the affirmative in Holliday v. State, 109 R.I. 93, 103 (1971) — "We hold, then, that those charged with misdemeanors that could result, upon conviction, in the imposition of a sentence of more than six months are entitled to a speedy

and prompt trial by an impartial jury in the first instance." The Supreme Court of Virginia reached the opposite conclusion in Manns v. Commonwealth, 213 VA. 2nd 233 (1972) holding that Mr. Justice White's footnote 30 in Duncan "makes it clear" that the question of "incorporation" was an "open" one.[11] To the same effect, see Walker v. Dillard, 363 F. Supp. 921 (W.D.V. 1973).

In Whitmarsh v. Commonwealth, ___ Mass. ___, 316 N.E. 2d 610, 618-619, the Supreme Judicial Court held that the "state of the law on the subject is highly uncertain" and therefore it was not "required to conclude either (a) that the Sixth Amendment would be interpreted at the present time by the Supreme Court to require a trial by jury in the first instance ..., or (b) that even if that court did reaffirm this rule ... with respect to the Federal Courts, it would apply such a requirement in equal fashion to the states." In other state jurisdictions, the issue is undecided. See ftn. 9 and 10 in Colten v. Kentucky, 407 U.S. 514 (1972) citing Massachusetts, North Carolina, Pennsylvania. Cf. Lemieux v. Robbins, 414 F2d 353, 355 ftn. 3 (1969), cert. denied, 397 U.S. 1017 (1970), noting the two-tier procedure in Maine. See also D. Non-Jury Trial for Misdemeanors Subject to De Novo Review, Appendix to opinion of Justice Harlan, Williams v. Florida, 399 U.S. 78, 141 (1970).

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[11] Cf. Manns v. Koontz, 451 F.2d 1345 (4th cir. 1971).

2. A second issue presented by this appeal is whether the imposition of a trial without jury is an unconstitutional burden on the defendant's right to a speedy trial and violates the double jeopardy provisions of the Fifth Amendment. The two-tier trial de novo procedure is totally counter-productive to minimizing the "anxiety and concern of the accused", Barker v. Wingo, 407 U.S. 514, 532 (1972), one of the main purposes of a speedy trial guarantee. For the defendant who chooses not to disclose his defense, a trial in the district court is a meaningless proceeding. A conviction and "appeal" from a district court trial generates a "cloud of anxiety, suspicion and often hostility", Barker v. Wingo, supra, and United States v. Marion, 404 U.S. 307, 321 (1971), and shifts the burden, in violation of the Fifth Amendment, to the defendant to prosecute his "appeal" to prove his innocence, G.L. Ch. 278 Sec. 24. See Holiday v. State, supra, at page 103, alternatively holding that two-tier trial de novo procedures violate the speedy trial provisions of the Sixth Amendment.

Similarly, the two-tier trial de novo system inherently violates the underpinnings of the double jeopardy provisions of the Fifth Amendment — "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and com-

pelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty", United States v. Green, 355 U.S. 184, 187-188 (1957)

Implicit in limiting "the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws", United States v. Jorn, 400 U.S. 470 (1971), is limiting it to a single proceeding which comports with constitutional standards, and it is no answer on the part of States to eventually offer the defendant a constitutional de novo adjudication, Ward v. Village of Monroeville, 490 U.S. 57, 61-62 (1972).

Since the above issues effect the administration of criminal justice in at least ten states, and since there is a conflict between at least two of these, it is submitted that the questions presented by this appeal are substantial and of public importance.

CONCLUSION

Appellant maintains that the decision of the Supreme Judicial Court was error in that it denied him his fundamental right to a speedy jury trial under the Sixth Amendment to the United States Constitution. Accordingly, he submits that the questions presented by this

appeal are so substantial to require plenary consideration for their resolution.

Respectfully submitted,

Robert W. Hagopian, Esq.
Counsel for Appellant

COMMONWEALTH

VS.

RICHARD I. LUDWIG

Supreme Judicial Court of Massachusetts, Norfolk.

Argued April 9, 1975

Decided June 12, 1975

Robert W. Hagopian, Wrentham, for defendant.

Paul S. Zonderman, Sp. Asst. Dist. Atty., for the Commonwealth.

Before TAURO, C.J., and BRAUCHER, HENNESSEY, KAPLAN and WILKINS, JJ.

KAPLAN, Justice.

This is one of a series of cases in which the defendant's counsel, representing a number of clients, has sought to test the constitutionality of the Commonwealth's "two-tier" or "trial de novo" system,[1] a procedure by which those ac-

1. See the listing of such cases in Whitmarsh v. Commonwealth, ___ Mass. ___, 316 N.E.2d 610, fn.4 (1974) (Mass.Adv.Sh. [1974] 1403, 1408-1409, fn.4). Costarelli v. Municipal Court of the City of Boston, ___ Mass. ___, 323 N.E.2d 859, fn.3 (1975) (Mass.Adv.Sh.[1975] 481, 487-488, fn.3). See also a connected case, Costarelli v. Massachusetts, ___ U.S. ___, 95 S.Ct. 1534, 44 L.Ed.2d 76 (1975).

cused of certain offenses may be tried first in a District Court without a jury, and, if convicted there, may secure a fresh trial, to a jury, at the next higher court level. See G.L.c.278, §18.

We need to refer here to one of the prior proceedings. In Whitmarsh v. Commonwealth, ___ Mass. ___,[a] 316 N.E.2d 610 (1974), Whitmarsh was tried in a District Court on a charge of operating a motor vehicle while under the influence of intoxicating liquor; he moved at the outset for trial by jury; the motion was denied. On trial he was found guilty. He appealed to the Superior Court where he would be entitled to a trial de novo with a jury. He moved in that court to dismiss, insisting on the invalidity of the procedure from the start. Pending decision of the motion, he filed a so called "interlocutory appeal" in this court for Suffolk County asking a declaration that the two-tier system was unconstitutional, and an injunction against further prosecution of the criminal charge. A single justice of this court denied the injunction and reserved and reported the case. We held that the "interlocutory appeal" could not be maintained, and we declined exercise of extraordinary power under our superintendency statute, G.L. c.211, §3. But "in view of the nature of the question which . . . [Whitmarsh] attempted to raise and in view of the fact that . . . [Whitmarsh's] counsel appears determined to raise the same question in other cases" (id. at ___,[b] 316 N.E.2d at 614, we undertook to state our opinion on the claimed infractions of constitutional rights— the right to a speedy trial under the Sixth Amendment, the right to jury trial under the Sixth Amendment and art.12 of the Massachusetts Declaration of Rights, and the guaranty against double jeopardy under the Fifth Amendment. We held each of these claims to be untenable. Id. at ___ - ___,[c] 316 N.E.2d 610.

In holding that the "interlocutory appeal" was not available, we indicated how a final decision might be obtained that would be subject to regular appellate review. We said, "If his motion were denied [i.e., Whitmarsh's motion in the Superior Court to dismiss], and if he were thereafter tried in the Superior Court and found guilty . . . [Whitmarsh] would have available to him an opportunity for appellate review of the ruling on his motion as matter of right by saving and perfecting exceptions thereto." (Id. at ___,[d] 316 N.E.2d at 613). Counsel followed that line in the present case. Here the defendant Ludwig, charged in the District Court of Northern Norfolk with driving to endanger (G.L.c.90 §24[2][a], moved for a jury trial which the judge denied; the defendant was then found guilty. In the de novo proceeding in the District Court of Northern Norfolk, Six Man Jury Session (similar for present pur-

[a] Mass.Adv.Sh. (1974) 1403.

[b] Mass.Adv.Sh.(1974) at 1408-1409.

[c] Mass.Adv.Sh. (1974) at 1408-1418.

poses to a de novo proceeding in the Superior Court, see G.L. c.278, §18), the defendant moved to dismiss, claiming among other things that the court lacked "jurisdiction" because of the improper refusal of a jury at first instance. The motion was denied over due exception and the defendant was fined $20. Imposition of sentence was stayed, and the case is before this court on a bill of exceptions, as amended, which in effect raises again the constitutional claims.

The case is properly here for review. The attack on "jurisdiction" is but a flourish, and add nothing to the constitutional points above mentioned which the defendant's counsel has been pressing with repetitious insistence. We have suffered no change of mind on the constitutional issued since the Whitmarsh decision.

Exceptions overruled.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH, AT BOSTON

IN THE CASE OF June 12, 1975.

COMMONWEALTH

vs.

RICHARD I. LUDWIG

pending in the District Court of Northern Norfolk for the County of Norfolk, Nos. 4157, 4158 and 4159

ORDERED, that the following entry be made in the docket; viz.,—

Exceptions overruled.

By the Court,
William M. Cloran, Asst. Clerk.

June 12, 1975

Brief statement of the grounds and reasons of the decision:

See opinion on file.

APPENDIX

Article XII of the Massachusetts Declaration of Rights:

No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

G.L. CH. 218 Sec. 26

District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective district or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for

money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven. Amended by St.1958, c. 138; St.1962, c. 722, §8; St.1964, c. 140; St.1969, c. 496; St.1973, c. 585.

G.L. CH. 278 Sec. 18

Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid.

The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall thereafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A. Amended by St.1973, c. 657.

Massachusetts General Laws, Chapter 278, Section 18A:

[Trial of misdemeanors in Suffolk county or in municipal court of Boston]

Any defendant, in any district court of Suffolk county or in the municipal court of the city of Boston, found guilty of a violation of a by-law, order, ordinance, rule or regulation made by a city or town or public officer or of any other misdemeanor, except libel, may appeal and claim a jury of twelve in the municipal court of the city of Boston. By claiming such appeal, the said claimant shall be deemed to have waived any claim of appeal to a trial by a jury in the superior court or other disposition in said superior court.

Any defendant, found guilty in any district court of Suffolk county or in the municipal court of the city of Boston, of a violation of any of the offenses enumerated in the first paragraph of this section who has appealed to the superior court, may, at any time before trial on such appeal, claim a trial by a jury of twelve in the municipal court of the city of Boston and by so doing shall be deemed to have waived any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by a jury of twelve in

the municipal court of the city of Boston has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of said municipal court of the city of Boston all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of twelve in said municipal court of the city of Boston shall have and exercise all the powers and duties which a justice of the superior court has, and may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has an interest.

Trials by such juries of twelve shall proceed in accordance with the provisions of law and rules of court applicable to trials by jury in the superior court. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in the superior court for Suffolk county. The district attorney for the Suffolk district shall appear for the commonwealth in all cases. The chief justice of the municipal court of the city of Boston shall arrange for jury sessions in the said municipal court and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of twelve in the said municipal court, review may be had directly by the supreme judicial court, by a bill of exceptions, appeal, report or otherwise in the same manner provided for trials by jury in the superior court. Any person taking an appeal under this section shall be subject to the municipal court of the city of Boston in matters of recognizance. In such matters, the said municipal court shall have all of the powers and duties of, and shall proceed in the same manner as the superior court.

BEST COPY AVAILABLE

Massachusetts General Laws Chapter 218, Section 27A:

[Trial by jury of six in certain courts]

Any defendant in a district court of Berkshire county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Central Berkshire.

Any defendant in a district court of Bristol county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the second or third district court of Bristol.

Any defendant in a district court of Essex county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of Essex or the central district court of northern Essex.

Any defendant in a district court of Hampden county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Springfield.

Any defendant in the first district court of northern Middlesex, the fourth district court of eastern Middlesex or the district court of Lowell found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Lowell.

Any defendant in the district court of Marlborough, the district court of Natick, first district court of southern Middlesex, the district court of central Middlesex or the second district court of eastern Middlesex found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the first district court of southern Middlesex.

Any defendant in the first district court of eastern Middlesex, the third district court of eastern Middlesex, the district court of Somerville, or the district court of Newton, found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the third district court of eastern Middlesex.

Any defendant in a district court of Norfolk county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of northern Norfolk or the district court of East Norfolk.

Any defendant in a district court of Plymouth county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the district court of Brockton.

Any defendant in a district court of Worcester county found guilty of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six may appeal and claim a jury of six in the central district court of Worcester.

Such claim of appeal shall be in writing and shall constitute a waiver of any claim of appeal to a trial by jury in the superior court or other disposition in said superior court.

BEST COPY AVAILABLE

Any defendant found guilty in any of said district courts, of an offense or crime over which the district courts have original jurisdiction under the provisions of section twenty-six who has appealed to the superior court may, in the discretion of a justice of the superior court, at any time before trial on such appeal, claim a jury of six in the district court designated in paragraphs one through ten of this section. Such claim shall be in writing and shall constitute a waiver of any right to a trial by a jury in the superior court or other disposition in said superior court. When a claim for a trial by jury of six has been made under the provisions of this paragraph, the clerk of the superior court shall forthwith forward to the clerk of the said district court all the papers in the case which have been filed in the superior court.

The justice presiding at such session over a jury of six shall have and exercise all the powers and duties which a justice of the superior court has any may exercise in the trial and disposition of such cases.

No justice so sitting shall act in a case in which he has either sat or held an inquest in the district court or otherwise has taken part in any proceeding therein.

Trials by such juries of six in a district court shall be held in the courthouse of said court or a courthouse of the superior court within the same county, and shall proceed in accordance with the provisions of law applicable to trials by jury in the superior court, except that the number of peremptory challenges shall be limited to two to each defendant. The commonwealth shall be entitled to as many challenges as equal the whole number to which all of the defendants in the case are entitled. Jurors shall be drawn from the pool of jurors available for the jury sessions in either civil or criminal sessions in the superior court. The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases The chief justice of the district

courts shall arrange for the jury sessions of the said district courts and shall assign justices and special justices thereto, to the end that speedy trials may be provided for such appeals. In the event of a trial by a jury of six in a district court, review may be had directly by the supreme judicial court by a bill of exceptions, appeal, report or otherwise, in the same manner provided for trials by jury in the superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three, but such waiver shall not revive any right to a trial by jury or other disposition in the superior court which had been waived under the provisions of the eleventh or twelfth paragraphs, of this section.

The justice presiding at such session over a jury of six shall, upon the request of the defendant, appoint a stenographer, who shall be sworn, and who shall take stenographic notes of all the testimony given at the trial, and shall provide the parties thereto with a transcript of his notes or any part thereof taken at the trial or hearing for which he shall be paid by the party requesting it at the rate fixed by the chief justice of the district courts; provided, however, that such rate shall not exceed the rate provided by section eighty-eight of chapter two hundred and twenty-one. Said chief justice may make regulations not inconsistent with law relative to the assignments, duties and service of stenographers appointed for any district court, and any other matter relative to such stenographers. The compensation and expenses of said stenographer shall be paid by the county.

G.L. CH. 278 Sec. 20

Upon such appeal, the clerk of the district court shall transmit to the clerk of the superior court a copy of the complaint and of the record of conviction, the original recognizances, a list of the witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses; and no other papers need be transmitted.

G.L. Ch. 278 Sec. 2

Issues of fact joined upon an indictment or complaint shall, in the superior court, be tried by a jury drawn and returned in the manner provided for the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

NORFOLK, ss DISTRICT COURT OF NORTHERN NORFOLK

COMMONWEALTH OF MASSACHUSETTS

VS.

RICHARD I. LUDWIG

MOTION FOR JURY TRIAL

Now comes the defendant and moves this court for a trial by jury in the first instance, a right guaranteed by the Sixth Amendment to the Constitution, Callan v. Wilson, 117 U.S. 540, Duncan v. Louisiana, 391 U.S. 145, ftn. 30; and a right guaranteed by the speedy trial provision of the Sixth Amendment, Klopfer v. North Carolina, U.S. , Holliday v. State, 280 A 2d 333; and a right guaranteed under the double jeopardy provisions of the Fifth Amendment, Benton v. Maryland, 89 S.Ct. 2056, United States v. Jorn, 400 U.S. 470.

By his attorney,

(s) ROBERT W. HAGOPIAN

Robert W. Hagopian, Esq.
Wrentham, Massachusetts 02093

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS DISTRICT COURT OF
NORTHERN NORFOLK
SIX MAN JURY
No. 4157-9

COMMONWEALTH

v

LUDWIG

MOTION TO DISMISS

Now comes the defendant in the above entitled action and says:

1. On March 11, 1974, he was charged in the District Court of Northern Norfolk on the above entitled complaints;

2. at the beginning of the proceedings he moved the court for a trial by jury in the first instance, asserting his Sixth Amendment right to a speedy trial by jury in the first instance. A copy of said motion is attached and made a part hereof.

3. The district court denied said motion.

4. The defendant was found guilty.

Wherefore, the defendant alleges that his conviction in the district court was void for being incontravention to the Constitution of the United States, Callan v. Wilson, 127 U.S. 540, 556-7; Duncan v. Louisiana, 391 U.S. 145, 158 ftn. 30, 181, 182 ftn. 21, 213; Holliday v. State, 380 A.2d 323; and as such the district court lack jurisdiction, Jones v. Robbins, 8 Gray 329, 330. Additionally, this court also lacks jurisdiction as this court's appellate jurisdiction must be predicated

on the jurisdiction of the district court.

And the defendant further maintains that to try him a second time in these circumstances would violate the double jeopardy provisions of the Fifth Amendment to the Constitution, and the speedy trial provisions of the Sixth Amendment.

By his attorney,

(s) ROBERT W. HAGOPIAN

Robert W. Hagopian, Esq.
Wrentnam, Massachusetts 02093

4/5/74 Denied. Defendant's exception noted.

(s) VIROSTEK SJ

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

CRIMINAL NO.150 of 1974

COMMONWEALTH OF MASSACHUSETTS

VS.

RICHARD I. LUDWIG

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Richard I. Ludwig, the appellant above named, hereby appeals to the Supreme Court of the United States from the judgment of the Supreme Judicial Court on Juhe 12, 1975. This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

By his attorney,

_____

Robert W. Hagopian, Esq.
Wrentham, Massachusetts 02093

CERTIFICATE OF SERVICE

Now comes Robert W. Hagopian, Esq., and certifies that he has served a copy of the above Notice of Appeal on John P. Connor, Jr., Esq., Assistant District Attorney, by mailing a copy of same first class, postage prepaid, to him at Norfolk Superior Court House, High Street, Dedham, Massachusetts 02026, on September 2, 1975.

_____

Robert W. Hagopian, Esq.
Wrentham, Massachusetts 02093